Supreme Court, U. S.
FILED
AUG 29 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-346

In the Matter of LITTLE SWITZERLAND BREWING COMPANY, Debtor, In Chapter XI Proceedings:

CHARLES E. OXLEY and FRED J. ELLISON,

Petitioners,

v.

LITTLE SWITZERLAND BREWING COMPANY, an extinct corporation, and James W. ST. CLAIR, As Special Counsel,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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APPENDIX A

Order of the United States Court of Appeals for the Fourth Circuit, entered June 1, 1978 denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 77-1812

In the Matter of Little Switzerland Brewing Company, a (an extinct) Corporation, Debtor.

Charles E. Oxley and Fred J. Ellison, Appellants,

versus

Little Switzerland Brewing Company, a (an extinct) corporation, and James W. St. Clair, Special Counsel, Appellees.

O R D E R

Upon consideration of the appellants' petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge

Winter for a panel consisting of Judge Winter, Judge Lay, and Judge Hall.

For the Court

/s/ William K. Slate, II
Clerk

A True Copy, T e s t e:

William K. Slate, II, Clerk

By: /s/ Faye L. Smith
Deputy Clerk

(Filed June 1, 1978)

APPENDIX B

[Judgment] of the United States Court of Appeals for the Fourth Circuit, dated and entered April 11, 1978 affirming order below.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 77-1812

In the Matter of Little Switzerland Brewing Company, a (an extinct) corporation, Debtor.

Charles E. Oxley and Fred J. Ellison, Appellants,

v.

Little Switzerland Brewing Company, a (an extinct) corporation, and James W. St. Clair, Special Counsel, Appellees.

Appeal from the United States District Court for the Southern District of West Virginia, at Huntington. John T. Copenhaver, Jr., District Judge.

Argued April 4, 1978 Decided April 11, 1978

Before WINTER, LAY,* and HALL, Circuit Judges

W. Kent Bishop (Charles F. Dodrill on brief) for Appellants; James W. St. Clair for Appellee.

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* United States Circuit Judge for the Eighth Circuit, sitting by designation

PER CURIAM:

Charles E. Oxley and Fred J. Ellison appeal from an order of the district court affirming the bankruptcy judge's denial of their petition to reopen the Chapter XI Arrangement for Little Switzerland Brewing Company. The petition to reopen was filed approximately five years after the date of the closing of the bankruptcy reorganization.

From our review of the record and our consideration of the arguments, both written and oral, we see no error. We affirm on the opinions of the bankruptcy judge and the district court.

AFFIRMED

APPENDIX C

Findings of Fact, Conclusions of Law and Order of the United States District Court for the Southern District of West Virginia, dated and entered January 24, 1977, denying the application to reopen.

UNITED STATES DISTRICT COURT FOR

THE SOUTHERN DISTRICT OF WEST VIRGINIA

In the matter of	:	
	:	
LITTLE SWITZERLAND BREWING	:	In Proceedings
	:	for an Arrange-
COMPANY, A West Virginia	:	ment
	:	
Corporation,	:	No. 8074
	:	
Debtor	:	

RE: APPLICATION TO REOPEN

FINDINGS OF FACT

CONCLUSIONS OF LAW

ORDER

INTRODUCTION

The applicants, Charles E. Oxley and Fred J. Ellison, by their application filed herein August 18, 1975, seek an order re-opening this Chapter XI case which was closed October 2, 1970. They further seek an order vacating the order of confirmation entered May 22, 1970, and revoking the amended plan of arrangement thereby confirmed. In connection therewith, the applicants seek related relief, the thrust of which would relieve the applicants from $50,000 judgments rendered against each of them in the state courts of West Virginia in 1973 upon their separate unpaid subscriptions for shares of stock of the above-named debtor.

At the hearing on this application, the court excluded certain exhibits and testimony, most of which were the subject of an offer of proof on the record. In

order to pass on all the contentions of the applicants, including those which the court considered at the hearing to be irrelevant, the following exhibits, together with accompanying testimony, are ORDERED admitted:

Applicants' Exhibits Nos. 36-42, 44-45, 51-56 and 59-60, inclusive.

FINDINGS OF FACT

1. THE PRE-BANKRUPTCY PERIOD

The formation and incorporation on January 22, 1968, of Little Switzerland Brewing Company, a corporation, was conceived by Robert P. Holley. Its purpose was to purchase and operate the assets of Fesenmeier Brewing Company, consisting of land, buildings, machinery and equipment used in the brewery business. Little Switzerland's authorized capital stock was fixed at 2,000,000 shares having a par value of ten cents each.

Immediately upon incorporation, Holley acquired 40,000 shares of its stock at a cost of $4,000. Within four weeks Holley had gathered nine other investors who purchased 5,000 shares of stock each at a cost of $5 per share or $25,000 each. As of February 18, 1968, these

ten individuals, holding all of the 85,000 shares of issued and outstanding stock of Little Switzerland, became its ten-member Board of Directors and remained as such for the ensuing two years. Two of them were the applicants herein, Charles E. Oxley and Fred J. Ellison. The salary of each member of the Board of Directors was fixed from the outset at $2,500 per year.

Little Switzerland acquired the Fesenmeier assets for $200,000 on April 1, 1968. This purchase was in part financed by the proceeds of a loan in that same amount from the Twentieth Street Bank, secured by a first lien deed of trust on those same assets. Its brewery operation then commenced. Six months later on October 16, 1968, Little Switzerland obtained a further loan from the Twentieth Street Bank in the sum of $150,000, guaranteed by the Small Business Administration and

secured by a second lien deed of trust on its assets. That loan was further secured by the guaranty thereof by eight of the directors, including Holley to the extent of 40% of the note, Oxley to the extent of 8.6% of the note and Ellison to the extent of 8.6% of the note. The additional security provided by the guaranty of these directors was required as a condition of obtaining the loan.

In addition to the 85,000 shares originally issued and held by the ten-member Board of Directors on February 18, 1968, the Board at that same time, including Oxley and Ellison, authorized the qualification for registration with the Securities Commissioner of the State of West Virginia of a 100,000-share intrastate offering. The Securities Commissioner permitted this 100,000-share issue to be sold to the public

on condition that members of the Board of Directors withhold their 85,000 shares from trading until the issue of 100,000 shares had been entirely sold. The directors, including Oxley and Ellison, so agreed in a writing signed and filed by them with the Securities Commissioner under date of June 23, 1968.

The sale went poorly, with only 18,348 shares thereof being marketed in a period of some eighteen months. In order to close out the issue and authorize trading in the shares held by the directors themselves, Holley conceived the notion of having the directors subscribe for the remaining 81,652 shares. Ellison made the motion that was unanimously adopted by Oxley and the other directors at the September 22, 1969, meeting of the Board to with-

draw the issue as of September 30, 1969. The result was that the remaining 81,652 shares were subscribed for between September 25 and 30, 1969, as follows: Oxley, 5,000 shares ($50,000); Ellison, 5,000 shares ($50,000); Audra M. Cook, Holley's confidante and now his wife, 31,652 shares ($316,520); and Valanco, Inc., a Holley-controlled corporate underwriter, 40,000 shares ($400,000).

Accompanying the stock subscription agreement of each of these four parties was a separate instrument entitled "Noninterest Bearing Nonobligatory Note," drawn in the amount of the purchase price for each block of stock and signed by the subscriber. Oxley and Ellison contend that they regarded their stock subcription agreement and "Nonobligatory Note" as being the equivalent of an

option to buy the stock. The West Virginia Supreme Court of Appeals concluded in 1973 that Oxley and Ellison were liable on their subscription agreements and that the accompanying notes should be treated as a nullity, thereby resulting in judgments against Oxley and Ellison on their subscription agreements for $50,000 each. See Little Switzerland Brewing Company v. Oxley and Little Switzerland Brewing Company v. Ellison, 197 S.E.2d 301 (W. Va. 1973).

After completion of the subcription of the 100,000 shares, Little Switzerland obtained permission from the Securities Commissioner of the State of West Virginia on October 10, 1969, to treat the issue as closed so as to permit the directors to dispose of their own shares. Con-

temporaniously with closing out the stock subscription issue, the Board authorized a nine for one stock dividend, thereby reducing the cost per share in the hope of increasing the marketability of the stock. Action by the Board to this end was taken on September 22, 1969, effective as to stockholders of record on October 5, 1969. Consequently, the 185,000 shares became 1,850,000 shares.

By February, 1970, it was evident to all that the corporation was insolvent. Holley resigned as president on February 28, 1970, at which time Oxley, who had been vice president since June 10, 1969, assumed the duties of the presidency until Oxley's resignation as vice president and member of the Board of Directors on May 18, 1970. During this period, efforts were focused on bringing into the organization

Herbert Singerman, president of August Wagner Breweries, Inc. As these negotiations ensued, and with the creditors threatening, the Board of Directors met on March 24, 1970. At that meeting, the eight remaining directors were present, Ellison and Mason Adkins having just resigned. Upon motions adopted, it was agreed that, of the 1,850,000 shares outstanding, Singerman would receive Holley's 400,000 shares (originally 40,000) along with 234,000 of the 450,000 shares (originally 45,000) of the other nine present and former directors. This was coupled with a motion designed to cancel the 830,370 shares held under subscription agreements of all kinds, of which 816,520 shares had been originally acquired by Oxley, Ellison, Audra Cook, and Valanco, Inc. pursuant to the September, 1969, subscription agreements

and 9 for 1 stock dividend. The cancellation motion, however, included a specific provision that such cancellation did not affect the rights of third persons. The transfer and cancellation were designed to provide Singerman with 60% ownership of Little Switzerland and permit him to take a 2-year option for 500,000 additional shares at $1 per share. Singerman was to pay nothing either to the shareholders or the corporation for either the 634,000 shares to be transferred to him or for the cancellation.

Two days later on March 26, 1970, an involuntary petition in bankruptcy was filed by creditors of Little Switzerland. On April 8, 1970, an agreement was entered into by the ten present and former directors on the

one hand and Singerman on the other, to effectuate the transaction contemplated by the action of the Board on March 24, 1970. The agreement expressly provided that cancellation of the stock subscriptions did not affect the rights of third persons. This provision was the product of the sage advice of Milton J. Ferguson, an attorney who represented one of the directors, Lucian Fry, and who brought to the attention of the Board the wisdom of inserting in the motion the savings clause respecting liability to third persons.

Turning now to the September 30, 1969, close-out of the 100,000-share issue, it is again noted that the directors were thereby freed to dispose of their shares. This some of them did prior

to April 8, 1970, as acknowledged on the first page of their agreement with Singerman under date of April 8, 1970. The number of shareholders increased from 280 as of October 6, 1969, to 390 by June 3, 1970. During this period directors Cole, Midkiff and Pullen disposed of substantial portions of their original shareholdings apart from those transferred to Singerman. In addition, Valanco, Inc. sold 7,000 shares on December 31, 1969, and disposed of another 5,881 shares by March 10, 1970, all out of the holdings originally acquired under its subscription agreement. By March 10, 1970, Audra Cook had transferred 18,008 of her shares obtained as a result of her subscription agreement. Although Oxley and Ellison continued

to hold their own shares until their transfer to Singerman of a portion of their holdings on May 26, 1970, their willing participation in the subscription close-out of the 100,000-share issue constituted a knowing deception practiced on the West Virginia Securities Commissioner and the public at large. Moreover, their attempt to evade liability by execution of a noninterest bearing, nonobligatory "note", constituted an abortive escape mechanism made available only to themselves, Holley's Valanco, Inc. and Audra Cook. All other stockholders were informed in a letter report of September 22, 1969, that they might purchase additional shares but only for cash or on a time-payment plan up to one year.

During the same six-month period from October 1, 1969, until bankruptcy,

Little Switzerland incurred new and larger liabilities to its creditors. An analysis of the tax claims and the Group 4 unsecured general creditors (being those in excess of $1,000) filed and allowed in this case discloses that they were incurred during the following periods:

When Claim Incurred	Unsecured General	Tax	Total
Before October 1, 1969	$ 59,177.36	-	$ 59,177.36
Partially before and partially after October 1, 1969 (indistinguishable)	73,105.85	$ 5,498.64	78,604.49
On and after October 1, 1969	55,828.75	18,684.26	74,513.01
Total	$198,111.96	$24,182.90	$212,294.86

It is seen from the chart that some $74,500 in debt was created after October 1, 1969, while another $78,600 was incurred partially before and partially after October 1, 1969. Moreover, trade accounts payable and tax obligations increased from $200,618.55 on December 31, 1969, to $232,261.68 as of March 26, 1970, when the involuntary bankruptcy petition against the debtor was filed.

In this connection, Little Switzerland operated at a loss from the outset. By the end of the first year of operation on March 13, 1969, it had recorded a loss of $165,000. During the next six months ending September 30, 1969, it had incurred a further loss of $95,000. The losses continued at an accelerating pace, reaching $80,000 during the three months ending December 31, 1969.

Nevertheless, the financial statements of Little Switzerland carried impressive figures. Whereas Little Switzerland had purchased the Fesenmeier land, buildings, machinery and equipment for $200,000 and added some $90,000 in equipment thereto, an appraisal of these very same assets was the basis for increasing their value on the balance sheet by $1,360,000. The financial statements were the subject of lengthy and detailed discussion at meetings of the Board of Directors attended by Oxley and Ellison who were aware or ought to have been aware of this plainly unjustified write-up in value of assets which consistently produced a loss. In reality, whether based on a capitalization of earnings test or on resale value, the fixed assets were worth less than cost rather than more. This proved to be the case beyond

any doubt when Singerman, a successful operator of August Wagner Breweries, Inc. was compelled to abandon his resuscitation effort some seven months after his takeover. As noted below, the brewery assets were sold at foreclosure four months later for a sum insufficient to pay even the second mortgage, followed by the dismantling of the brewery and the leveling of the property for development as a shopping center.

2. THE CHAPTER XI PERIOD

The Board at the March 24, 1970, meeting authorized the filing of a petition in bankruptcy by the debtor for either a Chapter XI arrangement or a Chapter X reorganization. As a consequence, the debtor by its attorneys, David Baker and Samuel Smith, filed a petition for an arrangement under Chapter XI in the pending involuntary bankruptcy case on April 15, 1970, followed by its filing of a plan of arrangement on April 30, 1970. Upon

due notice to creditors and the debtor, including circulation of the proposed plan, the plan came on for hearing before the court on May 11, 1970, and again at the continued hearing thereon on May 21, 1970.

At the hearing on May 21, 1970, the debtor appeared by its counsel, Samuel J. Smith and David M. Baker, and tendered to the court for filing the debtor's amended plan containing the same provisions as the original plan except that there was added thereto Articles IX and X. These two Articles were added in response to the insistence of a number of the creditors who wished to preserve for the benefit of the creditors such rights as the body of creditors or the debtor might have had to realize upon (1) stock subscription receivables and (2) causes of action generally, as well

as (3) any benefit to be obtained by the defeat of claims determined to be invalid. The amended plan was ordered filed on May 21, 1970, together with the further order of the court that the acceptances of the original plan would be deemed acceptances of the amended plan pursuant to section 364 of the Bankruptcy Act which authorizes such treatment with respect to plan modifications that do not materially and adversely affect the interests of creditors. In this instance, the plan modifications clearly enhanced rather than adversely affected the rights of the creditor body.

On May 22, 1970, the amended plan was ordered confirmed. On July 14, 1970, the court ordered distribution to the creditors of the cash and notes payable to them under the plan as follows:

	Claims	Cash	30-Month Installment Notes
Costs	$ 3,831.77	$ 3,831.77	$ ---
Priority Creditors:			
Taxes $24,182.90			
Other 800.84	24,983.74	24,983.74	---
Unsecured General Creditors:			
Groups 1, 2 & 3 (under $1,000)	19,165.98	12,516.39	---
Group 4 (over $1,000)	188,111.96	14,000.00	64,044.78
Totals	$236,093.45	$55,331.90	$64,044.78

Thereafter, the case was closed on October 2, 1970. The debtor, with Singerman at the helm, continued to operate until its doors were closed forever in December, 1970. In April, 1971, its assets were sold under the SBA-Twentieth Street Bank second lien deed of trust for the sale price of $63,000.00, such sale being necessarily made subject to the first lien indebtedness thereon of the Twentieth Street Bank in the approximate sum of $178,000.00 and subject as well to any unpaid ad valorem taxes.

The record of this case does not disclose how much was paid by the debtor before its demise on the 30-month non-interest bearing installment notes. Assuming that the first six installments due from June 22, 1970, through November 22, 1970, were made, the unsecured general creditors (whose claims aggregated $207,277.94) would have received

$26,516.39 in cash and $12,808.98 in payment on the notes. The unpaid portion of their claims, being $167,952.60, together with 41% interest thereon of $68,860.57 (calculated at 6% per annum from March 26, 1970, the date of the original bankruptcy filing, to January 26, 1977) aggregates $236,813.17.

It is suggested by the applicants that Singerman paid $89,000 to the corporation in exchange for cancellation of the stock subscriptions, the receivables for all of which aggregated $830,370. As already noted, Singerman paid nothing for either the 634,000 shares to be transferred to him by Holley and the others or for the shares that were to be cancelled. Singerman did advance $89,000 to Little Switzerland in order to fund the cash deposit of $61,000 required for the initial cash payout of costs and claims under the Chapter XI arrangement confirmed

by this court on May 22, 1970, and for other purposes. However, this $89,000 was not furnished as equity capital, but rather as a loan repayable by the debtor to Singerman and secured by a third lien deed of trust on the corporate assets.

3. ARTICLE IX OF THE AMENDED PLAN CONFIRMED BY THE COURT: FINDINGS OF FACT AND OPINION

The provisions of Article IX are as follows:

"Debtor agrees to employ the Huntington, West Virginia, law firm of Marshall, Harshbarger & St Clair (hereinafter referred to as "law firm") as Special Counsel for said Debtor for the purpose of collecting all monies due and owing said Debtor by reason of the following:

1. All delinquent stock subscription receivables including all notes and other contracts in connection therewith.

2. All causes of action of every kind and character assertable by the Debtor or by its body of creditors or stockholders, acting on behalf of the Debtor against any present or former officers, directors, stockholders or employees of the Debtor.

Debtor, however, will be advised by the law firm of all actions instituted pursuant to subparagraphs 1 and 2 above and provided copies of all legal documents connected therewith to regular counsel for the Debtor.

It is further contemplated that the law firm will not expend court costs in excess of Five Hundred ($500.00) Dollars in any particular action

without prior approval of the Debtor.

Any amount collected under subparagraphs 1 and 2 above shall be applied first to the payment of all such reasonable and necessary court costs incurred in connection therewith.

The balance shall be distributed one-third (1/3) as attorney fees to said law firm and the remaining balance to Debtor for immediate distribution in full, on a pro-rata basis, to the creditors whose claims have been filed and allowed in this proceeding in addition to and apart from any and all sums payable to such creditors under this amended plan of arrangement up to payment in full of all such claims so filed and allowed, together with interest at six per centum (6%) per annum thereon; any remaining balance

shall be retained by the Debtor."

Article IX of the amended plan was added to the original plan to preserve for the benefit of pre-bankruptcy creditors such rights as the body of creditors or the debtor might have possessed to realize upon stock subscription receivables and other causes of action. Otherwise, those rights would have been retained by the on-going debtor.

Upon confirmation of a plan under Chapter XI, the claims of pre-bankruptcy creditors are automatically discharged under section 371 of the Bankruptcy Act. The old creditors must look for satisfaction solely to the provisions made for them under the plan. By the same token, the discharged debtor is off to a fresh start. Upon plan confirmation, title to all property of the debtor automatically revests in him except insofar as the plan or the confirmation order

directs otherwise, §70i. Under the amended plan in this case, title to all property revested in the debtor except for the stock subscription receivables, causes of action and the like covered by Articles IX and X of the plan. So it is that, in the absence of a plan or confirmation order to the contrary, a Chapter XI debtor retains his property subject only to lien indebtedness, it being noted that secured debt is not subject to being dealt with under a Chapter XI plan. See §§ 306(1), 307, 356, 357. In addition, the on-going debtor is burdened with such provisions as have been made in the plan for the payment of the old debt. On the other hand, unlike reorganization under Chapter X, the debtor's stockholders remain untouched by Chapter XI.

In this case, the old unsecured general creditors in Groups 1, 2 and 3 (consisting

of creditors under $1,000) received cash. Creditors in Group 4 (covering claims over $1,000) received $500 each in cash and a 30-month noninterest-bearing installment note for 40% of the balance of their claims over $1,000. As already noted, this resulted in a deficiency of at least $167,952.60 plus interest to accrue.

It is to be observed that a Chapter XI plan must among other things, as a pre-requisite of confirmation, be accepted by a majority in number and amount of the claims filed and allowed by the unsecured creditors of each class affected by the plan (§ 362), and be found by the court to be for the best interests of the creditors (§366). A number of the creditors, as the price of their acceptance and support of the debtor's proposal, insisted that they,

rather than the surviving debtor, receive the benefit of any recoveries available on the stock subscription receivables and other causes of action. The creditors' request was an entirely proper one, made in the spirit of the give and take contemplated by Chapter XI in an effort to arrive at an acceptable plan between the debtor and its creditors.

4. APPLICANTS' GROUNDS FOR REOPENING THE CHAPTER XI CASE AND REVOKING THE AMENDED PLAN CONFIRMED BY THE COURT: FINDINGS OF FACT AND OPINION

The applicants, Oxley and Ellison, are now judgment debtors in state court for $50,000 each by virtue of their stock subscriptions. Their request for relief is founded on a number of grounds, all of which the court finds

without merit, as follows:

(1) The applicants contend that the amended plan was not authorized by the debtor in that there has been no showing that either the original plan or the amended plan was approved by the Board of Directors. It is conceded, however, that the Board of Directors authorized the debtor to proceed under Chapter XI and that the debtor did so. Counsel for the debtor then presented both a plan and an amended plan which purported to be filed by the debtor. The amended plan was confirmed by order of this court. Cash and notes were distributed under it, the old debts were discharged and the debtor was enabled to continue its business in reliance on the faith of the orders of this court. In accepting the benefits of the plan, the debtor plainly evidenced its

acceptance, approval and ratification of the plan confirmed by the court. Although this court is the proper one in which to raise any question respecting the validity of the order of confirmation of the amended plan entered on May 22, 1970, no such issue was presented until the lapse of more than five years after confirmation. Even now, this question has been raised only by Oxley and Ellison whose interest in defeating the state court judgments against them are antagonistic to the best interests of the creditor body that would derive the benefit of those judgments. A plainer case for application of the doctrine of laches would be difficult to imagine.

(2) The applicants insist that this court erred in confirming the amended plan without obtaining

acceptances thereof from the unsecured general creditors. The amended plan merely added Articles IX and X to the original plan. Section 364 of the Bankruptcy Act authorizes modification of a plan without obtaining acceptances anew from the creditors where the modification, as found by the court's order of May 21, 1970, does not materially and adversely affect the interests of creditors. In this instance, the addition of Articles IX and X served to enhance the interests of the creditors rather than adversely affect them.

(3) The applicants contend that Article IX has not been complied with in that James St. Clair and his firm of Marshall and St. Clair were not authorized to act as special counsel.

Although Article IX contemplated that the law firm of Marshall, Harshbarger and St. Clair would act as special counsel to pursue the provisions of Article IX, that firm dissolved on August 31, 1970, just prior to the institution of separate suits against Oxley and Ellison to collect upon their stock subscriptions. By agreement with Harshbarger (now Justice Harshbarger of the West Virginia Supreme Court of Appeals), Marshall and St. Clair retained and continued with the work of special counsel under Article IX. This court hereby approves, confirms and ratifies that agreement.

(4) The applicants contend that special counsel has failed to discharge the fiduciary responsibility imposed by Article IX. On the

contrary, special counsel has been faithful to its trust and fulfilled it with diligence. Over a period spanning more than six years, and after numerous cases and proceedings in both state and federal courts, judgments have been recovered for $50,000 each against Oxley and Ellison. In addition, suit was instituted within the first year against Valanco, Inc., but that case has not been pursued because a judgment against Valanco would be valueless. However, special counsel has recently gained service of process on Holley, a Florida resident, who has been joined in the action against Valanco in an effort to make him responsible for the obligation of Valanco. Holley's assets, however, are questionable (his prized airplane having been recently

repossessed) and the value of any forthcoming judgment against him, even assuming special counsel prevails, is highly doubtful. No action has been instituted against Audra Cook, a Florida resident, in that any judgment against her is deemed valueless. Moreover, Florida counsel have declined to accept the case against her on a contingent fee basis. The four subscription agreements signed by Oxley, Ellison, Cook and Valanco comprise more than 98% of all the stock subscription receivables. The reluctance of special counsel to institute suit against the other 2%, consisting of some 21 small accounts ranging from $100 to $1,500, owing by debtors located in numerous counties over the state and requiring a separate suit on each such account is both understandable

and justified. As to Article X, there was never any occasion for use of it to be made by special counsel.

(5) The applicants contend that James St. Clair is involved in a conflict of interest as special counsel in that he is not defending Cepco, Inc., as the purchaser from Twentieth Street Bank following the trust deed foreclosure sale of the debtor's real and tangible personal property in April, 1971. The applicants contend that St. Clair's representation of Cepco in class actions brought in 1974 by Oxley and Ellison on behalf of the debtor's shareholders to set aside the foreclosure sale is contrary to the interests of the creditors and stockholders of the debtor. Any such conflict is purely technical. There is nothing apparent in St. Clair's

representation of Cepco, Inc., in defending a foreclosure on property revested in the debtor by § 70i and which took place after the Chapter XI case was closed that would preclude him from vigorously pursuing Oxley and Ellison and other subscription receivable debtors for the benefit of the pre-bankruptcy creditors of Little Switzerland.

(6) The applicants contend that the forfeiture by the State of West Virginia in 1972 of Little Switzerland's corporate charter for failure to pay its license fees annuls the $50,000 judgments against each Oxley and Ellison subsequently mandated by the West Virginia Supreme Court of Appeals in 1973. This contention overlooks the function of the debtor for purposes

of Article IX. Little Switzerland is merely a trustee for the benefit of the pre-bankruptcy creditor body to whom there is owing as of January 26, 1977, a balance of some $236,800.00. In the exercise of an abundance of caution, Article IX made provision that any excess realized thereunder was to go to the debtor over and beyond the sum required to make whole the pre-bankruptcy creditor body, including 6% annual interest. The utter remoteness of the prospect that the debtor itself would ever acquire anything under Article IX was evidenced by the court's evaluation in its order of May 22, 1970, of the worth of the subscription receivables and causes of action under both Articles IX and X as being $50,000. This

evaluation was made for purposes of assessing Chapter XI costs payable to the United States District Clerk for the Referee's Salary and Expense Fund. Even with collection of judgments against Oxley and Ellison aggregating $100,000, the net after special counsel's one-third contingent fees and costs would be no more than some $65,000 plus interest from December, 1971, on the Ellison judgment and from June, 1973, on the Oxley judgment. In view of the uncollectibility of the Valanco and Cook accounts as well as the difficulty of tying Holley to the Valanco transaction and the questionable collectibility of any judgment recovered against him, coupled with the relative insignificance of the net value of the remaining 2% of the subscription receivables, there would appear no reason

to disturb now -- nearly seven years later -- the court's evaluation of $50,000. In reality, the net amount ultimately to be realized from all Article IX and X sources combined will come to a sum substantially less than the $236,800 required to make whole the pre-bankruptcy creditor body. So it is that Articles IX and X make Little Switzerland a mere trustee for the benefit of the pre-bankruptcy creditors. It is axiomatic that equity will not permit a trust to fail for want of a trustee. 76 Am. Jur. 2d. "Trusts," §121. If it be determined by a state or federal court of competent jurisdiction that a substitute trustee must be named to replace Little Switzerland Brewing Company in order to conclude

the legal proceedings now pending in state courts to collect the subscription receivables, then this court will comply therewith.

(7) Similarly, if and when it should become necessary for this court to interpret the distribution provisions of Article IX of the amended plan for any purpose, it will do so upon application by a party in interest with proper standing therefor at the time the need becomes apparent.

(8) The applicants contend that this court should not have authorized the mechanism under Article IX for recovery upon stock subscription receivables until first adjudicating that those subscriptions were the valid obligations of the subscription debtors after consideration of all

proper defenses thereto. It is observed that the bankruptcy court in both straight bankruptcy and Chapter XI is without jurisdiction to adjudicate such a controversy absent consent of the party defendant, In re Roman, 23 F.2d 556 (2d Cir. 1928), at least where the account is in dispute, Willyerd v. Buildex Co., 463 F.2d 996 (6th Cir. 1972). See, generally, Summary Jurisdiction, BANKRUPTCY AND THE CHAPTER PROCEEDINGS, ICLE, Ann Arbor, Mich. (1976). When the applicants were sued in state court, it was incumbent upon them to raise every available defense. The fraud issues that applicants would now undertake to present in this court, consisting of common law fraud and violations of federal and state securities laws,

are issues that ought to have been presented in the state court proceedings and are governed by the doctrine of res judicata. See Little Switzerland Brewing Company v. Oxley, supra; Little Switzerland Brewing Company v. Ellison, supra.

The applicants urged at the hearing, however, that the bankruptcy court, as a court of equity, ought to intervene in their behalf on the fraud issues on broad equitable grounds. Although jurisdiction for this purpose would seem vested solely in the state courts in which the judgments were rendered, it would appear that Oxley and Ellison are in equity barred by application of the equitable doctrines of laches and unclean hands. As to alleged fraud practiced on them by Holley in inducing each of them to purchase 5,000

shares of stock for $25,000, no protest or effort of any kind to rescind was made by either from 1968 to 1974. They came into Little Switzerland almost at the very outset in February, 1968. They remained as directors for over two years until bankruptcy, derived annual salaries of $2,500 each as members of the Board of Directors, observed the inability of the debtor to pay those salaries after May, 1969, and received and discussed financial statements showing grossly inflated real estate values and consistent, accelerating losses. Still, they did nothing to rescind until the filing of their Rule 60(b) motions in state court in 1974.

As to their September, 1969, stock subscription agreements of $50,000 each, Oxley and Ellison would rescind on

grounds that (1) they were again duped by Holley, and (2) the 100,000-share intrastate issue out of which those subcriptions arose is subject to rescission, at least by them, by virtue of alleged securities act violations such as the interstate sale of 100 shares out of that 100,000-share issue to the LaFons in August, 1968. Yet, Oxley and Ellison well knew that the very purpose of closing out the 100,000-share issue with their subscriptions was to circumvent the state's securities laws in order to make it appear that a stock issue authorized by them as directors had been fully subscribed when, as they mistakenly thought by virtue of their "nonobligatory notes," it had not -- all of which was designed to permit the directors to commence trading in their own shares. The

court recognizes that Oxley and Ellison believed they were not liable on their subscriptions. Indeed, that was part and parcel of a calculated deception -- not upon them, but by them. Once the deed was done, neither Oxley nor Ellison took prompt steps to rescind. During the ensuing six-month period, new shareholders invested in the debtor, new debt was incurred and total liabilities were substantially increased. Still, it was not until the eve of bankruptcy, on March 24, 1970, that the Board of Directors voted to cancel the subscriptions. Even then, rescission was not attempted. The Board, doubtless in recognition of the directors' own potential for personal liability, expressly provided that such cancellation would not affect liability to third persons. The subsequent agreement of Oxley, Ellison and the

other directors with Singerman, under date of April 8, 1970, specifically so stipulated. The reference to third persons plainly embraced creditors and other shareholders. So it is that no effort to rescind the continuing liability of Oxley and Ellison on their subscription agreements was ever undertaken until 1974.

Furthermore, even without the savings clause respecting "third persons" before it, the West Virginia Supreme Court of Appeals held the cancellation ineffective by virtue of W. Va. Code, § 31-1-35, which renders a board of directors powerless to cancel stock subscriptions held by an insolvent corporation absent actual payment. As the Supreme Court noted, the directors of an insolvent corporation in this state are trustees for the

creditors. The action of Oxley and Ellison in seeking cancellation by the Board of their stock subscriptions was clearly an attempt to violate their fiduciary duties.

Oxley and Ellison are individuals of at least ordinary intelligence who held responsible positions in government and business, respectively, prior to their affiliation with Little Switzerland. Their business activities included membership by Oxley on the board of Uptowner Inns, Inc. and by Ellison on the board of Stonewall Jackson Life Insurance Company. Although neither of them participated in active management of the debtor until Oxley took over in February, 1970, each of them enjoyed inside access and ample opportunity to discover immediately, by the exercise of due diligence,

any alleged act of fraud of which they would now complain. Their attempt to invoke the equitable aid of this court to rescind vis-a-vis the unpaid creditors comes far too late, Morrisey v. Williams, 74 W. Va. 636, 82 S. E. 509 (1914). See also Bryan v. Bartlett, 435 F. 2d 28 (8th Cir. 1970, rehearing en banc denied 1971), cert. den. 402 U. S. 915 (1971).

(9) The applicants further contend that adequate consideration was derived by the debtor for the cancellation. First, applicants suggest that Singerman paid $89,000 to the debtor for the $830,370 in cancelled subscriptions. Aside from the utter inadequacy of the amount paid for purposes of cancellation, it has already been demonstrated that not even that sum was paid as equity. Rather, it

was advanced as a loan repayable by the debtor to Singerman and secured by a third lien deed of trust on the debtor's assets. Second, applicants contend that it was necessary to cancel the 830,370 in subscriptions in order that Singerman could be given a 2-year option to purchase 500,000 shares at $1 per share; that is, without the cancellation, there were only 150,000 unissued shares remaining out of the 2,000,000 shares of authorized capital stock with which to meet the option requirements. Doubtless, the agreement with Singerman could have been structured in any of several ways that would have accorded him substantially the same measure of control and option rights. Even assuming, however, the necessity of providing for the option out of the 830,370

subscription shares, the subscribers could have given Singerman an option on their subscribed shares for which they would either have paid or remained liable.

CONCLUSIONS OF LAW

The court concludes as follows:

1. This court, as the Chapter XI court ordering confirmation of the debtor's plan, is vested with inherent jurisdiction respecting the validity, construction and interpretation of, and compliance with, its order confirming the plan and the plan itself, pursuant to which the court determines that the confirmed plan is valid, has been complied with and is not subject to revocation.

2. By virtue of Article III of the confirmed plan and section 368 of the

Bankruptcy Act, this court does not retain jurisdiction over the debtor or its property following the closing of the case on October 2, 1970, except insofar as the court's jurisdiction might properly be invoked to require compliance by the debtor with its duties under the plan as trustee for the benefit of the debtor's pre-bankruptcy creditors.

Accordingly, IT IS ORDERED that the application to reopen be, and it hereby is, denied.

ENTER: January 24, 1977

/s/ John T. Copenhaver, Jr.
United States District Judge

APPENDIX D

Order of the United States District Court for the Southern District of West Virginia, dated and entered January 15, 1976, remanding to Bankruptcy Court to take evidence on issues raised in application to reopen.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF WEST VIRGINIA

HUNTINGTON

IN THE MATTER OF

LITTLE SWITZERLAND BREWING COMPANY,
a corporation, Debtor

O R D E R

Upon review and consideration of the record of this case on appeal from the Bankruptcy Court of the Southern District of West Virginia, it is ORDERED that this case be and the same is hereby remanded to said Bankruptcy Court for the purpose of taking evidence on the issues raised in the Application to Reopen.

The Clerk is directed to transmit certified copies of this Order to counsel of record.

ENTER: January 15, 1976

/s/ Dennis R. Knapp
DENNIS R. KNAPP
UNITED STATES DISTRICT JUDGE

APPENDIX E

[Order] of the United States Bankruptcy Judge in the Southern District of West Virginia, dated and entered September 10, 1975, denying application to reopen.

UNITED STATES DISTRICT COURT FOR

THE SOUTHERN DISTRICT OF WEST VIRGINIA

In the matter of	)	
	)	In Proceedings for
LITTLE SWITZERLAND	)	an Arrangement
BREWING COMPANY,	)	No. 8074
a West Virginia	)	
corporation,	)	
	)	
Debtor	)	

At Huntington, in said district, on the 10th day of September, 1975.

Upon the application of Charles E. Oxley and Fred J. Ellison, filed on August 18, 1975, to reopen the above-styled case terminated under Chapter XI by order entered on October 2, 1970; and it appearing that, by order entered on May 22, 1970, an amended plan of arrangement for the above-named debtor was confirmed, following which this case was closed by the aforesaid order of October 2, 1970; and it further appearing that Article IX of the confirmed plan provided, in effect, that James W. St. Clair, as

counsel, would pursue for and on behalf of said debtor the collection of stock subscription-note receivables owing by the said Charles E. Oxley and Fred J. Ellison, pursuant to which judgments in the state courts of West Virginia in the sum of $50,000 have since been recovered against each the said Charles E. Oxley and the said Fred J. Ellison; and it further appearing that the reopening of the above-styled case is being sought by two individuals, the said Oxley and Ellison, whose interests here are antagonistic to the estate of said debtor and who wish to frustrate the collection of the aforesaid judgments by undertaking to invoke the jurisdiction of this court for the unwarrantable purpose of litigating issues that were in dispute or ought to have

been raised in proceedings before state court tribunals having jurisdiction thereof and which proceedings are governed by the doctrines of res judicata and collateral estoppel, and further, for the inexcusably delayed purpose of reforming or revoking the confirmed plan aforesaid some five years after entry of the orders confirming the plan and closing the estate and in the remnants of which plan they have shown no legitimate interest; and it further appearing that no cause has been shown for the reopening of the above-styled case; it is accordingly

ORDERED that the aforesaid application to reopen be, and the same hereby is, denied.

/s/ John T. Copenhaver
Bankruptcy Judge

Copies of above order mailed to the following on September 10, 1975:

1. W. Kent Bishop, Esq.
   Attorney at Law
   Valley Forge Building
   92 Luckie Street, N. W.
   Atlanta, Georgia 30303

2. James W. St. Clair, Esq.
   Attorney at Law
   523 Seventh Street
   Huntington, West Virginia 25701

/s/ Jeanette M. Alexander
Chief Clerk, Bankruptcy Court

APPENDIX F

Statutes Involved.

STATUTES INVOLVED

§ 1. Meaning of Words and Phrases. The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: ***

(11) "Creditor" shall include anyone who owns a debt, demand, or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy; ***

§ 2. Creation of Courts of Bankruptcy and Their Jurisdiction. a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed,

with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to--***

(8) Close estates, by approving the final accounts and discharging the trustees, whenever it appears that the estates have been fully administered or, if not fully administered, that the parties in interest will not furnish the indemnity necessary for the expenses of the proceeding or take the steps necessary for the administration of the estate; and reopen estates for cause shown;***

§ 58. Notices. a. Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt or as afterward filed

with the papers in the case by the creditors, of (1) all examinations of the bankrupt, if the court so directs; (2) all hearings upon applications for the confirmation of arrangements and wage-earner plans; (3) all meetings of creditors; (4) all proposed sales of property: Provided, That the court may, upon cause shown, shorten such time or order an immediate sale without notice; (5) the filing of all accounts of the receiver and trustee, for which confirmation is asked, and the time when they will be examined and passed upon; (6) the proposed compromise of a controversy unless the court, for cause shown, directs that notice be not sent; (7) the proposed dismissal of the proceedings, in cases where notice is required by subdivision g of section 59 of this Act; and (8) all applications

by receivers, ancillary receivers, marshals, trustees, committees, and attorneys for compensation from the estate for services rendered, specifying the amount and by whom made: Provided, however, That where a creditors' committee has been appointed pursuant to this Act, the notice required by clauses (1), (4) and (6) of this subdivision shall be sent only to such committee and to the creditors who have filed with the court a demand that all notices under this subdivision be mailed to them.

§ 63. Debts Which May Be Proved. a. Debts of the bankrupt may be proved and allowed against his estate which are founded upon***

(4) an open account, or a contract express or implied;***

(8) contingent debts and contingent contractual liabilities; or

(9) claims for anticipatory breach of contracts, executory in whole or in part,

including unexpired leases of real or personal property:***

§ 63 b. In the interval after the filing of an involuntary petition and before the appointment of a receiver or the adjudication, whichever first occurs, a claim arising in favor of a creditor by reason of property transferred or services rendered by the creditor to the bankrupt for the benefit of the estate shall be provable to the extent of the value of such property or services.

§ 302. The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent with or in conflict with the provisions of this chapter, apply in proceedings under this chapter. For the purposes of such application, provisions relating to "bankrupts" shall be deemed to relate

also to "debtors," and "bankruptcy proceedings" or "proceedings in bankruptcy" shall be deemed to include proceedings under this chapter. For the purposes of such application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under section 322 of this Act, and the date of adjudication shall be taken to be the date of the filing of the petition under Section 321 or 322 of this Act except where an adjudicaiton has previously been entered.

Sec. 308. A creditor shall be deemed to be "affected" by an arrangement only if his interest shall be materially and adversely affected thereby. In the event of controversy, the court shall after hearing upon notice summarily determine whether any creditor is so affected.

Sec. 313. Upon the filing of a petition, the court may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it--

(1) permit the rejection of executory contracts of the debtor, upon notice to the parties to such contracts and to such other parties in interest as the court may designate;***

Sec. 315. Whenever notice is to be given under this chapter, the court shall designate, if not otherwise specified hereunder, the time within which, the persons to whom, and the form and manner in which the notice shall be given. Any notice to be given under this chapter may be combined, whenever feasible, with any other notice or notices under this chapter.

Sec. 334. Not less than twenty-five nor more than forty days after the petition is filed the court shall hold a first

meeting of creditors.

Sec. 335. (1) The notice of such meeting of creditors shall be accompanied by a copy of the proposed arrangement, if filed, a summary of the liabilities and a summary of the appraisal, if one has been made, or, if not made, a summary of the assets.***

(3) The notice of such meeting of creditors as hereinbefore provided may also name the time for the filing of the application to confirm the arrangement and the time for the hearing of the confirmation and of such objections as may be made to the confirmation.

Sec. 353. In case an executory contract shall be rejected pursuant to the provisions of an arrangement or to the permission of the court given in a proceeding under this chapter, or shall have been rejected by a trustee or a

receiver in bankruptcy or receiver in equity in a prior pending proceeding, any person injured by such rejection shall, for the purposes of this chapter and of the arrangement, its acceptance and confirmation, be deemed a creditor.***

Sec. 355. Creditors, including the United States, any State, and any subdivision thereof, shall file their proofs of claim before confirmation except as follows:***

(2) a claim arising from the rejection of an executory contract of the debtor may be filed within such time as the court may direct.

Sec. 361. An arrangement which at the meeting of creditors, as provided in section 336 of this Act, has been accepted in writing by all creditors affected thereby, whether or not their

claims have been proved, shall be confirmed by the court when the debtor shall have made the deposit required under this chapter and under the arrangement, and if the court is satisfied that the arrangement and its acceptance are in good faith and have not been made or procured by any means, promises or acts forbidden by this Act.

Sec. 363. Alterations or modifications of an arrangement may be proposed in writing by a debtor, with leave of court, at any time before the arrangement is confirmed; or where the court has retained jurisdiction pursuant to the provisions of section 368 of this Act, an arrangement providing for an extension of time for the payment of debts in whole or in part may be altered or modified after it has been confirmed to the extent and subject to the limitations set forth in section 387 of this Act.

Sec. 364. Unless the court finds that the proposed alteration or modification does not materially and adversely affect the interest of any creditor who has not in writing assented thereto, the court shall adjourn the meeting or, if closed, reopen the meeting, and may enter an order that any creditor who accepted the arrangement and who fails to file with the court, within such time as shall be fixed in the order, his rejection of the altered or modified arrangement, shall be deemed to have accepted the alteration or modification and the arrangement so altered or modified, unless the previous acceptance provides otherwise.

Sec. 365. At least ten days' notice of the adjourned or reopened meeting, together with a copy of the order, if entered, and of the proposed alteration

or modification, shall be given to the debtor, the creditors, and other parties in interest.

Sec. 366. The court shall confirm an arrangement if satisfied that--

(1) the provisions of this chapter have been complied with;

(2) it is for the best interests of the creditors and is feasible;

(3) the debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt; and

(4) the proposal and its acceptance are in good faith and have not been made or procured by any means, promises, or acts forbidden by this Act.

Confirmation of an arrangement shall not be refused solely because the interest of the debtor, of if the debtor is a corporation, the interests of its stockholders or members will be preserved under

the arrangement.

Sec. 367. Upon confirmation of an arrangement--

(1) the arrangement and its provisions shall be binding upon the debtor, upon any person issuing securities or acquiring property under the arrangement and upon all creditors of the debtor, whether or not they are affected by the arrangement or have accepted it or have filed their claims, and whether or not their claims have been scheduled or allowed and are allowable;***

Sec. 371. The confirmation of an arrangement shall discharge a debtor from all his unsecured debts and liabilities provided for by the arrangement, except as provided in the arrangement or the order confirming the arrangement, but excluding such debts as, under section 17

of this Act, are not dischargeable.